

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of

PUGET SOUND ENERGY, INC.,
and NW ENERGY COALITION

For an Order Authorizing PSE To
Implement Electric and Natural Gas
Decoupling Mechanisms and To
Record Accounting Entries
Associated With the Mechanisms

.....
WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION,

Complainant,

v.

PUGET SOUND ENERGY, INC.,

Respondent.

DOCKETS UE-121697 and
UG-121705

DOCKETS UE-130137 and
UG-130138

PUBLIC COUNSEL RESPONSE TO
NW ENERGY COALITION
MOTION TO LIMIT
PARTICIPATION AS INTERVENOR

I. INTRODUCTION

1. Public Counsel files this response to the NW Energy Coalition (NWEC or Coalition) Motion to Limit Participation As An Intervenor in this proceeding (Motion), filed October 22, 2014. As a general matter, Public Counsel does not oppose NWEC's request to limits its

participation due to resource constraints. For the reasons stated below, however, Public Counsel does oppose the Coalition's request that it be allowed an exception to Commission hearing procedures to tender its witness Ralph Cavanagh for testimony at the remand evidentiary hearing.

II. RESPONSE

A. NWEC's Role With Regard to The Remaining Issues Is Very Limited.

2. The chief interest of the Coalition in this proceeding from the outset has been the adoption of a decoupling mechanism by Puget Sound Energy (PSE). That interest has been satisfied by incorporation of a full decoupling mechanism in the PSE Rate Plan. It bears repeating that PSE's decoupling mechanism is not at issue here, as the Court has specifically noted.¹ Public Counsel did not oppose adoption of decoupling in the proceeding below and neither Public Counsel, nor any other party, challenged the adoption of the PSE decoupling mechanism in the appeal. Decoupling is now in effect for PSE and its continuation is not at issue in this case.

3. As stated by the Commission in Order 11, the core purpose of these remand proceedings is for "the Commission to receive additional evidence on what rate of return on equity (ROE) should be used 'to establish fair, just, reasonable, and sufficient rates to be charged under the rate plan [.]'"² The burden of proof is on PSE to support its recommended ROE for purposes of the rate plan, in order to show that its proposed rates are just and reasonable.³ The Commission has

¹ Order Granting In Part and Denying In Part Petitions for Judicial Review, Appendix A, n.1 (Judge Carol Murphy, Thurston County Superior Court Nos. 13-2-01576-2, 13-2-01582-7 (consolidated))("Decoupling is not at issue in this appeal.")

² Order 11, ¶ 2.

³ RCW 80.04.130(4). Order 11, ¶ 3.

established a remand procedure which provides for expert witnesses to address that question through new filings of additional pre-filed evidence, including at minimum, “fully developed analyses of data available prior to June 25, 2013, such as are usually undertaken to support advocacy on the issue of return on equity.”⁴

4. There are two key components to the cost of capital and return of equity (ROE) determination: (1) the effect of market conditions on cost of capital; and (2) the effect of the newly adopted decoupling mechanism. NWECC states that it takes no position on the former issue.⁵ With regard to the latter issue, NWECC states: “The NW Energy Coalition has already presented evidence and arguments in support of this position ...[and] continues to take the same position and *does not plan to offer new evidence in the remand proceedings, as the Coalition’s evidence and argument in support of this position is already before the Commission.*”⁶

5. Ordinarily, a party in this position in a proceeding would simply ask permission to take no further role in the proceedings, relying on the existing record. Consistent with that, the Coalition states it “would not be permitted to file additional testimony or other evidence, would not be permitted to participate in discovery, would not be permitted to cross-examine other parties’ witnesses at the hearing, and would not participate in post-hearing briefing.” Public Counsel has no objection to these limitations if that is NWECC’s preference, and the limits seem consistent with the scope of the issues on remand and with NWECC’s posture with respect to the central issues. As discussed in the next section, however, Public Counsel does object to the special exception which the Coalition requests regarding hearing testimony.

⁴ Order 10, ¶ 27. Order 11, ¶¶ 14-15.

⁵ Motion, ¶ 4.

⁶ Motion, ¶ 6 (emphasis added).

B. The Request To Tender Mr. Cavanagh As A Witness Is Not Appropriate.

6. Public Counsel opposes the Coalition request that it be allowed to participate in the hearing “for the limited purpose of allowing the Commission and opposing parties to cross-examine the Coalition’s expert witness, Ralph Cavanagh, on the testimony and evidence the Coalition has already presented[.]”⁷ There are a number of problems with this request.
7. The purpose of Commission evidentiary hearings in utility proceedings is to allow for cross-examination of witnesses who have pre-filed written testimony, have been subject to discovery, and pre-filed written rebuttal or cross-answering testimony.⁸ In Mr. Cavanagh’s case, all of these have already occurred, as the Coalition admits. The Coalition clearly states that it has no new evidence to offer and that it stands on the record it has already created in the earlier phase of the proceeding. The Coalition has, therefore, pointed to no legitimate purpose under the Commission rules for Mr. Cavanagh to take the stand a second time for cross-examination.
8. Mr. Cavanagh’s appearance could have only two possible outcomes. The first would be the repetition of testimony that he has already given in the initial evidentiary hearing. Allowing such duplicative testimony is objectionable under the Commission rules and serves no valid purpose in the proceeding,⁹ essentially allowing one party “two bites at the apple.”¹⁰
9. The other possible result of Mr. Cavanagh’s appearance would be to provide him an opportunity to provide testimony, upon questioning from parties or the bench, addressing and responding to the new and additional evidence provided by other parties in the remand

⁷ Motion, ¶ 9.

⁸ See e.g., WAC 480-07-460 and 470.

⁹ WAC 480-07-495(1) (Presiding officer may exclude repetitive or unnecessary testimony).

¹⁰ Notably, NWEC asks the Commission to limit discovery rights of other parties because of a concern that it would simply duplicate discovery in the earlier phase. Motion, n.1. To the extent Mr. Cavanagh’s oral testimony simply echoed or supported positions taken by PSE or other parties, it would also be duplicative.

proceedings, or offering other new evidence of his own. Any such testimony, however, would constitute either live direct or live cross-answering (or rebuttal testimony) testimony of a type that is not allowed under Commission rules and precedent. The Commission hearings are designed for cross-examination of pre-filed testimony, not for presentation of live direct or rebuttal testimony. The purpose of this structure reflects the technical and complex nature of the subject matter and is based on fundamental fairness and due process. Rather than presenting parties with surprise testimony at hearing, the Commission procedures, as reflected in the Prehearing Conference Order in this case, allow adverse parties to conduct discovery, file written rebuttal or cross-answering testimony, and then to carefully prepare any cross-examination.¹¹ This also furthers the development of the best possible record for Commission decision.

10. No party has requested that Mr. Cavanagh be made available for cross-examination and Public Counsel does not plan to do so if he has no additional pre-filed testimony. Public Counsel and any other party would be substantially prejudiced with respect to Mr. Cavanagh's testimony if he is permitted to provide live direct or cross-answering testimony, as to which Public Counsel has had no opportunity to conduct discovery, file a written response, or prepare cross-examination.

11. In summary, neither potential outcome of NWECC's request is appropriate. Allowing Mr. Cavanagh's appearance would either be duplicative and unnecessary, or would be impermissible live testimony, not allowed under Commission rules, or the Prehearing Order in this case, and unfair to other parties.

¹¹The Commission's rules reflect the intent to avoid surprise by requiring parties to identify which witnesses they will cross-examine, for how long, and to pre-file the cross-examination exhibits several days in advance of the hearing.

12. Finally, the Coalition's request is inappropriate because the purpose of the hearing is to take "additional evidence"¹² with the specific purpose of determining PSE's cost of capital for establishing rates under the rate plan, with an emphasis on "fully developed analyses of data contemporaneous with the entry of Order 07."¹³ That evidence will be provided primarily, if not exclusively, by cost of capital experts preparing new analyses. Since NWEAC is clear that it has no added evidence to offer on this issue, through Mr. Cavanagh, or otherwise, Mr. Cavanagh has no appropriate role in the remand hearing. As Commissioner Jones noted in his Separate Statement in Order 07, Mr. Cavanagh is not a cost of capital expert.¹⁴ Any testimony he would offer would therefore be of limited, if any, value to the Commission in its evaluation of the expert financial analyses provided by witnesses for PSE, Commission Staff, Public Counsel, and Industrial Customers of Northwest Utilities. Ultimately, PSE bears the burden of proof to support its recommended cost of capital for use in setting rates under the rate plan. That burden cannot be carried by NWEAC, Commission Staff or by any other party.¹⁵

III. CONCLUSION

13. For the foregoing reasons, Public Counsel respectfully requests that the NWEAC Motion To Limit Participation be denied, with regard to the proposed participation of Mr. Cavanagh. Public Counsel has no objection if the Coalition wishes to continue its advocacy on relevant issues in the remand proceeding, but it should do so in the same manner as other parties, by presenting pre-filed testimony, not through the inappropriate procedure proposed.

¹² Order 11, ¶¶ 2, 4, 5.

¹³ Order 11, ¶ 15.

¹⁴ Order 07, Separate Statement of Commissioner Jones, ¶ 8.

¹⁵ *Id.* ¶¶ 3, 8.

14. If the Coalition does not wish to participate in the remand phase, Public Counsel has no objection to the other limitations on participation requested by the Coalition.

15. DATED this 29th day of October, 2014.

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